(1)

90-340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES N. STEPHENS,

Petitioner,

v.

TERRY S. COLEMAN, ISABEL P. DUNST,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Office of General Counsel of the Health and Human Services Department deprived petitioner of his statutory veterans preference rights in violation of 5 U.S.C. § 3318(b) (3) when he applied for the position of Regional Attorney and was denied any reason for his non-selection nor did the agency file any written reasons with the OPM or its own office justifying the veterans passover.

II.

Whether the lower courts correctly barred petitioner's constitutional claims against two Health and Human Services officials for denial of equal protection, administrative due process, freedom of speech, and the right to be free from illegal discrimination.

III.

Whether the lower courts impermissibly minimized the breadth of the national federal official venue statue at 28 U.S.C. § 1391 (e) by determining that there was no personal jurisdiction over agency federal officials sued in Georgia.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES N. STEPHENS,

Petitioner,

v.

TERRY S. COLEMAN, ISABEL P. DUNST,

Respondents.

No. 89-8551

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, James N. Stephens, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled cause on May 23, 1990.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals is attached as Appendix A. The opinion of the district court for the Northern District of Georgia is attached as Appendix B.

JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was filed on May 23, 1988. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime
>
> * * *
>
> Nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

(i) *Course of Proceedings and Disposition Below*

Petitioner (Plaintiff and Appellant below), a Schedule A federal employee, veteran, long time Deputy Regional Attorney for HHS Region IV, and Acting Regional Attorney applied for appointment to the vacancy of Regional Attorney, Region IV (now Chief Counsel). In the present case, Plaintiff filed an action against two federal officials, the Acting General Counsel and an Associate

General Counsel of the agency. Plaintiff sought damages against the individual officials for constitutional and statutory violations if it should be determined that there could be no relief in the companion case against the agency. (Complaint, R. 1). The basis for jurisdiction in the district court was 28 U.S.C. § 1331, 28 U.S.C. § 1361, and the due process clause of the Fifth Amendment of the Constitution of the United States. A petition is being filed simultaneously for the review of that decision in CA-8550, Court of Appeals for the Eleventh Circuit. The District Court granted Defendants' Motion to Dismiss in the present case and denied Plaintiff's Motion for Reconsideration. Plaintiff filed a notice of appeal and the Court of Appeals for the Eleventh Circuit issued an opinion in CA-8551 on May 23, 1990, affirming the District Court.

(ii) *Statement of the Facts*

Vacancy announcement 85-GCA-2 was issued by the Office of General Counsel, HHS, for the position of Regional Attorney, Region IV, with a closing date for applications of May 1, 1985. Petitioner (Plaintiff and Appellant below) applied under the vacancy announcement for the position of Regional Attorney. His outstanding qualifications for the appointment are evident from his background (third ranking graduate at the Wake Forest Law School), eleven years as Deputy Regional Attorney, Acting Regional Attorney for seven months, and important special assignments during his twenty-one year career with the HHS Office of General Counsel. However, Plaintiff was advised of his non-selection by a telephone call from Acting General Counsel Coleman on or about August 13, 1985. The selection certificate originally issued on May 31, 1985, was limited to thirty (30) days. A selection was not made under the certificate until August 12, 1985, more than thirty (30) days beyond the issuance. The certificate was not extended. On August 14, 1985, in a subsequent telephone conversation Plaintiff was advised by Mr. Coleman that a consideration in favor of the selection of Mr. Granger was his being from outside the Atlanta Office.

Plaintiff filed a grievance with Mr. Coleman on September 11, 1985, under the HHS grievance procedure. Mr. Coleman's decision of October 8, 1985, rejected Plaintiff's grievance of September 11, 1985, on the ground that any grievance of a "Nonselection for promotion from a group of properly ranked and certified candidates" is excluded from the grievance coverage. By letter of October 8, 1985, Mr. Coleman refused to grant Plaintiff's request for a deferment of his decision pending Plaintiff's request for documents under the Freedom of Information Act pertinent to the grievance. Plaintiff filed a second grievance or amended grievance with General Counsel Robertson on October 25, 1985, alleging additional errors in the selection process, specifically that the selecting official: failed to properly rank and group candidates for the position of Chief Counsel, Region IV; failed to choose the selectee from a list of properly certified candidates; improperly considered criteria outside the selection criteria in vacancy announcement 85-GCA-2; improperly used scoring matrices in violation of the HHS Merit Promotion Plan; improperly delegated to a subordinate of the selecting official the authority to rate candidates in violation of the HHS Merit Promotion Plan; and failed to give Plaintiff a veterans preference as required by law. The second grievance or amended grievance was rejected by Mr. Robertson's letter of November 19, 1985, concluding that the rejection of the initial grievance by Mr. Coleman was appropriate. Plaintiff formally grieved the November 19, 1985 decision of the second stage grievance officer, Mr. Robertson, on December 5, 1985 (insofar as his decision reached the merits of the second grievance) and Plaintiff asked for an investigation and hearing by a grievance examiner pursuant to the HHS formal grievance process. By letter of December 9, 1985, from Plaintiff's counsel to Mr. Robertson, Plaintiff requested written reasons for his pass over as a preference eligible veteran. By letter of December 24, 1985, from Mr. Robertson to Plaintiff's counsel, Mr. Robertson denied Plaintiff's request for written reasons. HHS Assistant Secretary for Management and Budget John J. O'Shaughnessy in his response of January 30, 1986, refused to consider the "second or amended grievance" of October 25, 1985 on the merits. Paul C. Johnson, III

Director, Office of Human Relations, issued the "final decision of the Department" on February 26, 1986, denying Plaintiff's request for reconsideration, which had sought to review the Department's refusal to consider Plaintiff's grievance. After Plaintiff's complaint in CA 8550 was filed on August 26, 1986, HHS advertised by Vacancy Announcement 86-GCA-8 the new position of Chief Counsel, Region IV, Atlanta, Georgia, SES, on September 15, 1986. The former position of Chief Counsel, Region IV, Atlanta, Georgia, GS-15, was converted to the Senior Executive Service (SES). The SES Vacancy Announcement stated that candidates must have had experience as a GS-15 or equivalent. Plaintiff was a GM-14, equivalent paywise to a Senior Level GS-14. Although he applied for the position, the effect of the Competitive Requirement as stated in the announcement was to preclude Plaintiff from consideration for the SES position. At the injunction hearing, the court requested the Assistant United States Attorney to determine if Plaintiff would be considered in light of the stated competitive requirement. After consultation with an agency personnel official, the Assistant United States Attorney advised the court that he would not meet the requirement. C89-8550, R. 2-56. (All later citations to C89-8550 are to Vol 1.)

After the filing of this complaint against the individual Defendants on August 10, 1987, Plaintiff was advised on August 14, 1987, by Mr. Granger, the selectee (now restyled as Chief Counsel of Region IV), that the Plaintiff's then current position of Deputy Chief Counsel was eliminated. The reason given for the elimination of the position by Chief Counsel Granger was that he no longer needed a deputy. However, shortly afterwards two (2) new positions were created to substitute for the eliminated position of Deputy Chief Counsel, and advertised on October 15, 1987. The functions of the eliminated Deputy Chief Counsel were absorbed into the two (2) new positions of Deputy Chief Counsel. Although Plaintiff applied for the new positions and although his background, experience and achievement were superior to the other applicants, he was not chosen for either new position. One applicant who was chosen for one of the positions had little, if any, previous supervisory experience. The selections were announced

on December 7, 1988, after which Plaintiff filed a timely motion to amend asserting retaliation.

Although Plaintiff has also filed grievances with the agency as a result of these actions pointing to specific procedural and substantive deficiencies, the grievances have been summarily rejected without being considered on the merits, referred to a grievance official for investigation, or otherwise handled in accordance with regulatory requirements. Plaintiff's non-selection as Regional Attorney, the initial retaliatory action by Defendants, was caused by Plaintiff's refusal to criticize his superior. By opposing age discrimination directed against the Regional Attorney, Carl H. Harper, who Defendants sought to remove for his age, Plaintiff was excluded from further consideration as Mr. Harper's successor. The series of palpably retaliatory and prejudicial personnel decisions depreciated Plaintiff's standing in the Office of General Counsel and among federal attorneys throughout the Atlanta area who knew Plaintiff when he was President of the Atlanta Chapter of the Federal Bar Association in 1972-1973. From having been the third ranking student in his class at Wake Forest Law School, recognized as the outstanding staff attorney in the Regional Attorney's office, recipient of the Outstanding Younger Federal Lawyer Award of the Atlanta Chapter of the Federal Bar Association in 1971, Deputy Regional Attorney for eleven years, and six months as Acting Regional Attorney, Plaintiff's overall professional standing has been blemished and stigmatized by the retaliatory actions set out in this complaint and amendment.

I.

VETERANS PREFERENCE

WHETHER THE OFFICE OF GENERAL COUNSEL OF THE HEALTH AND HUMAN SERVICES DEPARTMENT DEPRIVED PETITIONER OF HIS STATUTORY VETERANS PREFERENCE RIGHTS IN VIOLATION OF 5 U.S.C. § 331 (b) (3) WHEN HE APPLIED FOR THE POSITION OF REGIONAL ATTORNEY AND WAS DENIED ANY REASON FOR HIS

NON-SELECTION NOR DID THE AGENCY FILE ANY WRITTEN REASONS WITH THE OPM OR ITS OWN OFFICE JUSTIFYING THE VETERANS PASSOVER.

The lower courts incorrectly decided that Plaintiff's non-selection was for an internal promotion, and, therefore, Plaintiff was not entitled to veterans preference rights. Defendants' assertion that Plaintiff is not entitled to a veterans preference for a selection of the Regional Attorney is incorrect and in head-on conflict with the memorandum of the member of General Counsel's own staff (HHS) which stated to Acting General Counsel that a veterans preference should be accorded, a statement of reasons given in writing for nonselection of the veteran, and the reasons in writing for nonselection returned with the certificate of appointment (R.1. Complaint C-86-1875A, par. 24 (a) (d) and CA-8550 at R. 12 Ex. A.). The Veterans' Preference Act of 1944, 58 Stat. 387, as amended, in part now codified at 5 U.S.C. § 3318 states, in part:

> (a) The nominating or appointing authority shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under Section 3317 (a) of this title (5 U.S.C. Section 3317 (a)), unless objection to one or more of the individuals certified is made to, and sustained by, the Office of Personnel Management for proper and adequate reason under regulations prescribed by the Office.
>
> (b) (1) If an appointing authority proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, such authority shall file written reasons with the Office for passing over the preference eligible. The Office shall make the reasons presented by the appointing authority part of the record of the preference eligible. The Office shall determine the sufficiency or insufficiency of the reasons submitted by the appointing authority, taking into account any response received from the preference

> eligible under paragraph (2) of this selection. When the Office has completed its review of the proposed passover, it shall send its findings to the appointing authority and to the preference eligible. The appointing authority shall comply with the findings of the Office.
>
> * * *
>
> (b) (3) A preference eligible not described in paragraph (2) of this subsection, or his representative, shall be entitled, on request, to a copy of — (A) the reasons submitted by the appointing authority in support of the proposed passover and (B) the findings of the Office.
>
> * * *

The Civil Service Commission has been replaced by the Office of Personnel Management (OPM). The Office refers to OPM. The agency makes all veterans preference determinations for excepted appointments, as was the Regional Attorney vacancy; and must follow a fixed and definite procedure so that the veteran may readily learn the manner in which legal requirements in preference were performed. Federal Personnel Manual, Chapter 302, Section 2-4, July 21, 1982.

The agency, through its General Counsel, refused to state any reasons for Plaintiff's non-selection (filed in CA-8550 at R. 12, Ex. B.). In addition, the agency failed to return any reason with the appointment certificate for non-selection of a veteran (R.1, Complaint 86-1875A, par. 24(e)). The agency has produced no documents related to the veteran passover other than the memorandum of the member of the General Counsel staff stating that a veterans preference should be accorded. (R. 12, Ex. B, *supra*).

The Attorney General's Memorandum of September 24, 1979, rendered after adoption of the CSRA, categorically applies preference rights to veterans applying for attorney appointment (filed in CA-8550 at R. 12, Ex. D). The opinion to OPM states that the general direction of Section 2 of the Veterans Preference Act

of 1944 is that a preference is granted to eligible veterans in the excepted service. (The essential distinction between the competitive service and the excepted service is that the positions in the former are filled by competitive *examinations* while those in the latter are not. See 5 U.S.C. §§ 2102, 2103). As a result of the opinion, agencies were advised that part 302 of the Federal Personnel Manual was being revised to delete point preferences, but in the meantime the agencies must continue to provide preferences to veterans applying for attorney appointments and provide, on request, reasons for their non-selection (cover letter to Attorney General's Memorandum, *supra*). HHS Instruction 302-1 gives the same direction:

> When positions (such as attorneys) are excluded by FPM Chapter 302 from standard rating procedures, applicants with veterans preference or entitlement to priority consideration are still entitled to their rights. For example, if a categorical rating system is used and a veteran and a nonveteran are both ranked in the top category, the nonveteran may not be selected ahead of the veteran without written explanation of the reasons why the veteran is being passed over. Upon request, these reasons must be made available to the veteran. (302-1-60 D.2, HHS Transmittal 82.23 (9/27/83)).

However, the agency has claimed that veterans preference is not applicable to an internal promotion. The agency's own Office of General Counsel's policies do not support this position. There is no question but that the appointment to Regional Attorney was advertised on an external basis (outside the agency) and was not even restricted to employees of the federal government (Vacancy Announcement 85-GCA-2, filed in CA-8550 at R. 12, Ex. E). The only two minimum qualifications were membership in a state, territory or commonwealth bar and five years experience in the practice of law or its equivalent. However, those applicants in the federal service had to meet time-in-grade requirements. HHS Instruction 302-1 defines an external appointment as "the filling of an excepted position from outside the Department" among other

possible circumstances (302-1-30) (filed in CA-8550 at R. 12, Ex. F). The appointment of Regional Attorney having been made on a selection from outside the agency, the appointment procedure was external even though an employee has the right to apply for any position being filled by external appointment." (302-1-100E). The appointment of Regional Attorney was "being filled by external appointment" (filed in CA-8550 at R. 12, Ex. F). Thus, the agency is in the intolerable position of now contending in face of the facts that this was an "internal appointment". It has demonstrably violated its own policies even after appropriate advice by administrative officials, in appearance a willful statutory violation. Plaintiff's request through his counsel during the pendency of administrative proceedings for a statement of reasons for non-selection was admittedly denied (Complaint in C86-1875A, par. 24 (e)-(f) at R. 1; and Answer to the foregoing in CA-8550 at R. 8).

In *Vitarelli v. Seaton*, 359 U.S. 535, 79 S. Ct. 968, 31 L.Ed. 2d 1012 (1959), the Supreme Court held that the petitioner's dismissal from government service on grounds of national security fell substantially short of the requirements of applicable department regulations, and that the dismissal was illegal. The Court held that failure of the Departmental Secretary to adhere to his own regulations which required a statement of reasons for a dismissal on security grounds was fatal to the discharge. The Secretary was bound by his own regulations even though he could have discharged the employee without statement of any reason if he had not promulgated the regulations. This case not only holds that the agency must abide by its own regulations but also shows by analogy that Plaintiff need not establish prejudice in denial of a statement of reasons for his non-selection as Regional Attorney, and the failure to abide by the requirement invalidates the selection. The position announcement was an open announcement not restricted to federal or agency employees. It was, therefore, an external appointment. An internal promotion is one limited to applicants within the agency, i.e. to attorneys already employed by the HHS Office of General Counsel.

Plaintiff has the same right to a veterans preference *vis a vis* other veteran applicants not within the agency or employed by the federal government. Not being granted this right, Plaintiff was denied equal protection of the veterans preference scheme as compared to non-federal employees and attorneys employed by other federal agencies. Other non-federal or non-agency attorneys who were preference eligible applied for the appointment or could have applied would presumably have been deemed eligible for the preference by the Office of General Counsel. Not being current employees of HHS, the agency could not by the wildest stretch have classified the appointment as an "internal promotion" as to non-agency attorneys. Thus, those attorneys were presumably given a veterans preference while Plaintiff was not. Plaintiff was thus deprived of equal protection and due process by the unreasonably disparate treatment given to him as opposed to applicant attorneys who were veterans not already employed by HHS.

HHS Instruction 302-1 defines an external appointment as "the filling of an excepted position from outside the Department" among other possible circumstances (302-1-30). The appointment of Regional Attorney having been made in a selection advertised outside the agency, the appointment procedure was external even though an employee of the agency was selected. An excepted service employee has the right to apply for any position being filled by external appointment. (302-1-100E). Several of the "best qualified" applicants were not employees of the agency. The agency is in the intolerable position of having violated its own regulations even after receiving appropriate unsuperseded advice by an Attorney General's Memorandum. Plaintiff's request through his counsel during the pendency of sham administrative proceedings for a statement of reasons for non-selection was admittedly denied (Complaint, filed in CA-8550 at R.1, par. 24 (e)-(f); and Answer to the foregoing at R. 8).

The CSRA has no legislative history, no language, nor any intimation that limits review of a veterans' preference entitlement. Neither has any court expressed the view that CSRA limits judicial review of veterans preference rights. The district court cites

Crowley v. United States, 527 F.2d 1176, 1183 (Ct.Cl. 1975) in support of its grant of summary judgment against veteran Stephens on the apparent assumption that the position of Regional Attorney applied for by Plaintiff was a "promotion". However, under the precise personnel terminology applicable to Plaintiff's case, this was an "appointment". The Regional Attorney selectee was appointed to the position, whether chosen from outside the federal government or from within the federal government. Neither *Crowley, supra*, nor *Qualls v. United States*, 678 F.2d 190, 196-197 (Ct.Cl. 1982), are detrimental to Plaintiff if "appointment" is correctly applied. The cases dealt with federal employees in the competitive service, and not as Plaintiff, in the excepted service. Both dealt with *internal* competition within the agency. Plaintiff applied for a vacancy not only on a government wide basis but on an unlimited open announcement. Thus, the advertisement of the vacancy and selection was on an external basis as opposed to internally within the agency.

Employment in the excepted service is governed by 5 CFR, Part 302. Veterans preference rights including those of plaintiff under 5 U.S.C. § 2108 (3) must be granted each individual considered for appointment in the excepted service (5 CFR 302.101). Before the regulation in 5 CFR Part 302 was amended on September 13, 1988, (*see* Fed. Reg., Vol. 53, 35291-2, No. 177), agencies were compelled to treat excepted employee/applicants as though they were external candidates. Fed. Reg., Vol. 52, 35291, No. 249 (12-29-87). Although agencies now have more flexibility, they still must accord them the same veterans preference rights as previously. It is clear that neither *Crowley* nor *Qualls* are authority to deprive an excepted service employee of a veterans preference when applying for an external appointment, i.e., for a position that is not filled by an internal promotion from among employees within the agency and under the same appointing authority. The appointing authority for the Regional Attorney position was delegated from the HHS Secretary's Office to the General Counsel. The appointing authority for the remaining positions in the Regional Attorney's Office was at the regional level. Movement to any position filled

under a different appointing authority must necessarily be processed as a new appointment under the new authority. *See* Fed. Reg., Vol. 54, 37685, No. 175 (9-12-89). Therefore, the position of Regional Attorney had to be filled under appointment procedures, and under OGC policy was advertised on an open basis to all qualified applicants within and without federal service. There were no more than three veterans among the individuals considered for the appointment, based upon information furnished by the agency. Plaintiff was entitled as a preference eligible under 5 U.S.C. § 2108 A and B to be considered for appointment if among the highest three eligibles, as he was, and if not selected the basis must have been submitted to OPM and sustained, which was not done. Further, he was entitled to the reason submitted by the appointing authority, which was not given. Plaintiff alleged that the instant appointment was external, and there is no evidence of record that it was anything else. The allegations of Plaintiff must be taken at face value, and there is no affidavit or other admissible evidence to show the contrary. The facts, as alleged and shown by the vacancy announcement, are that the appointment was advertised on an external basis (outside the agency) and was not even restricted to employees of the federal government (*see* Vacancy Announcement 85-GCA-2, *supra*, at R.12, Ex. E. in CA-8550). The record in CA-8550 contains the affidavit of H. Dean Minor, former District Counsel for the Veterans Administration, whose expert opinion was that there was a likelihood of success on the issues that the appointee was selected on a void certificate and improperly denied veterans preference (CA-8550, R.2). This affidavit was adduced in support of Plaintiff's motion for a temporary restraining order and preliminary injunction in CA-8550.

In any case, Plaintiff's right under the veterans preference statutory scheme and implementing regulations would be unaffected by a CSRA preemption theory even if extended to preempt suits against federal officers under the asserted *Bush v. Lucas* doctrine. As forcefully stated in *Bush*, the veterans protection of federal employees is guaranteed by statute. Congress did not repeal these statutory rights guaranteed to Plaintiff by the CSRA.

Plaintiff would still have the right to vindicate deprivation of the statutory veterans preference to the appointment even if a preemption doctrine were to otherwise immunize federal officials against First Amendment violations. The holding of *Bush v. Lucas* is confined to the question of whether "to permit a federal employee to recover damages from a supervisor . . . for exercising his First Amendment rights".

Plaintiff's reliance upon 28 U.S.C. § 1331 and 28 U.S.C. § 1361 as a juridictional basis in addition to the Administrative Procedure Act is appropriate. The veterans preference statute and regulatory scheme provides a distinct statutory avenue for relief under 28 U.S.C. § 1331 even if the APA did not. In addition, even if judicial review of so-called minor personnel actions were foreclosed by the enactment of CSRA, this would not forbid judicial review under 28 U.S.C. § 1361 to insure that agency proceedings adhere to statutory mandates. *See Burroughs v. Office of Personnel Management*, 764 F.2d 1300, 1302 (9th Cir. 1985). 28 U.S.C. § 1361 states:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform the duty owed to the plaintiff."

The definition of appointment and its use under civil service regulations as applied to Plaintiff is a matter of fact mixed with law. Plaintiff has alleged that he applied for appointment to the position of Regional Attorney. Defendants have not shown as a matter of law by evidence or authority that he was not seeking an "appointment", whether or not it would be a promotion as well for an appointee already in the Office of General Counsel. The determination that the selection was one of internal promotion is incorrect and is unsupported by the record on Defendant's Rule 12 (b) (6) motion. The lower courts plainly erred by concluding that Plaintiff as a matter of law was not entitled to a veterans preference. As a matter of law, and based upon the facts alleged by

Plaintiff, which are not contested, Plaintiff was denied a veterans preference.

The Court of Appeals decision, if left to stand, will be construed to limit a veterans preference to the initial appointment to federal service, for it will be contended in nearly all cases that a current federal employee seeking a new appointment to a vacancy is merely seeking a "promotion". It was not the intent of the Congress to so narrowly fashion a veterans preference. There is sparse case precedent in this area, and as a result the lightly considered Court of Appeals decision will have precedential value far in excess to its merit. The effect will be to deprive numerous veterans of a statutory benefit without the consideration of a soundly reached judicious opinion, one that merits more than the recital of a few lines of Department of Justice boilerplate.

Those veterans in our workplace, from Iwo Jima to Vietnam, deserve better.

II.

CONSTITUTIONAL CLAIM

WHETHER THE LOWER COURTS CORRECTLY BARRED PETITIONER'S CONSTITUTIONAL CLAIMS AGAINST TWO HEALTH AND HUMAN SERVICES OFFICIALS FOR DENIAL OF EQUAL PROTECTION, ADMINISTRATIVE DUE PROCESS, FREEDOM OF SPEECH, AND THE RIGHT TO BE FREE FROM ILLEGAL DISCRIMINATION.

Even courts that have determined that CSRA preempts the implication of private rights to sue for violation of "prohibited personnel practice" under 5 U.S.C. § 2302 have indicated that the court will review constitutional violations alleged by federal employees when there is a protected property interest. *See Broadway v. Block*, 694 F.2d 979 (5th Cir. 1982); *Veit v. Heckler*, 746 F.2d 508 (9th Cir. 1984). *Borrell v. U.S. Intern. Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982) held that

there was no APA preemption of the constitutional remedy and stated:

> But we can find no clear signal in that legislative history that Congress meant to deprive appellant of the only cause of action to protect her constitutional rights and which she had even before the CSRA was passed (at 991).

Use of the CSRA to override established APA review of constitutional and statutory violations and denial of grievance procedures established by regulation for federal employees is without foundation and upsets established notions of justice and law in the federal personnel arena.

Arnett v. Kennedy, 416 U.S. 134, 151, 94 S. Ct. 1633, 1643, 40 L. Ed.2d 15 (1974) determined that a federal employee had "liberty" and "property" interest in his employment. The court determined that procedural rights were constitutionally guaranteed to public employees. *Arnett v. Kennedy, supra*, featured a federal employee who was terminated. In the language of Mr. Justice Rehnquist, the employee had a "statutory expectancy" that he not be removed in violation of applicable statutory authority. Here, Plaintiff seeks review of agency decisions rejecting his grievance on the agency's failure to adhere to statutory and regulatory requirements. In this case, Plaintiff had sought selection to a vacancy as Regional Attorney. Plaintiff was denied veterans preference and deprived of the appropriate processes by which a selection is made from a group of candidates. In rejecting his grievance, the agency refused to consider the grievance on its merits, and determined that it need not consider the grievance because Plaintiff had made an administrative complaint of age discrimination. The agency not only arbitrarily denied Plaintiff's request to defer the decision pending an FOIA request and refused to refer the grievance to an examiner for investigation, but also refused to rule on the merits of the grievance in violation of the due process clause of the Fifth Amendment. In addition, the agency gave a patently constitutionally impermissible reason for rejecting the grievance

— that plaintiff had filed an age discrimination complaint. He was penalized for having exercised a right to complain to his EEO officer of age discrimination.

The rationale of the Supreme Court's decision in *Arnett, supra*, broadly establishes in the federal employee the right to be protected in terms of employment in those situations where Congress, or the agency by regulation, has granted defined rights. Plaintiff has set out unmistakably defined statutory and regulatory rights which have been denied, e.g., the failure to grant a hearing on his grievance and the failure to grant a veterans preference. These are statutory expectancies to the federal employee, and a property right. Plaintiff has a legitimate claim of entitlement to a veterans preference, to a hearing on his grievance, and to the issuance of a validly processed and validly issued appointment certificate to the vacancy for which he applied, but for which a non-veteran was selected. Plaintiff's property interest meets the standard constructed in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578, 92 S. Ct. 2701, 2709, 33 L.Ed.2d 548 (1972):

> Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than an unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Plaintiff's liberty and property interest in the right to a hearing on his grievances, administrative due process, and a statement of the reasons for his non-selection to an external appointment must be ultimately preserved by resort to the Constitution. The stigma and embarrassment of not being appointed to a vacancy to

which he had served in an acting capacity for seven months, and Deputy for eleven years prior to the vacancy stemmed directly from the deprivation of specified statutory and constitutional rights. Plaintiff unsuccessfully moved to amend his complaint to specifically allege further stigma, embarrassment, loss of professional reputation, and to couch additional specific allegations of retaliation by the agency's infringements of the First and Fifth Amendments to the Constitution of the United States occurring after the complaint was filed. The right to free speech was abrogated when Plaintiff was penalized for having stated to Assistant General Counsel Liz Dunst prior to the vacancy that former Regional Attorney Carl H. Harper possessed the legal acumen to competently perform his job duties. Assistant General Counsel Dunst evaluated Plaintiff as not worth further consideration to succeed Mr. Harper in her rating and ranking of candidates for the selection official (R. 1, par. 25). This evaluation was wholly unsupported by the facts of Plaintiff's distinguished record of leadership, experience and proven legal skills. As a result of Plaintiff's expression of opinion concerning the legal faculties of his superior in relation to his operation of the Regional Attorney's office, Plaintiff was denied free speech. *See Borrell v. U.S. Intern. Communications Agency*, 682 F.2d, 981, 989 (D.C. Cir. 1982). Plaintiff's grievances that the certification of the appointee was invalid and that the evaluative (rating and ranking) process for the selection of the appointee was defective were ultimately administratively rejected on the basis that Plaintiff had filed a formal complaint alleging age discrimination. This rejection was in effect a penalty and retaliation for Plaintiff's having filed a complaint that he was entitled to express under statutory law, specifically, the Age Discrimination Act of 1974, as amended, 29 U.S.C. § 633a, and under the First Amendment. There is no legal justification for approving the rejection of a grievance on the grounds stated by the agency official. The effect of the rejection was to deprive Plaintiff of a hearing on his grievance because he filed a discrimination claim. The Constitution confers upon Plaintiff a right to be free from illegal discrimination. *Davis & Passman*, 442 U.S. 228, 236,

99 S.Ct. 2264, 2272, 60 L.Ed. 2d 846 (1979). *See Rode v. Dellasciprete*, 845 F.2d 1195 (3rd Cir. 1988).

The Office of General Counsel's construction and application of the veterans preference law, contrary to the memorandum of a member of the General Counsel's staff and memorandum of the Attorney General, denied Plaintiff the equal protection of the law in violation of the Fifth Amendment. Plaintiff was deprived of equal protection by the arbitrary construction of the veterans preference statute by the HHS Office of General Counsel in relation to attorneys in other agencies of the United States and attorneys from outside the agency, federal and non-federal, who sought appointment to the vacancy of Regional Attorney. It is given that there exists a federal right of action for damages against a federal official for violating a constitutional right. *Bivens v. Six Unknown Federal Narcotic Agents*, 403 U.S. 388 (1971). Plaintiff has alleged a constitutional violation of his rights as well as violation of his veteran's preference statutory rights and violation of his administrative due process. In Plaintiff's original action against the agency, the agency argued in a pending motion that there was no remedy against the agency for Plaintiff's claim because the Civil Service Reform Act of 1978 (CSRA) Pub. L. 95-454, 92 Stat. 1111 *et seq.* preempts all other remedies. There being no judicial remedy for Plaintiff under this statute, Plaintiff filed an action against the individual Defendants named in the original action as having violated Plaintiff's rights. The action is stated to be against each acting under the color of federal office, and seeks damages only if no relief is granted in the original action against the agency. By motion to dismiss Defendants interposed against their own personal liability the doctrine of *Bush v. Lucas*, 462 U.S. 367 (1983). The facts in *Bush* reveal that he had benefited from the remedy of a $30,000 back pay award and retroactive reinstatement after a favorable administrative recommendation of the Civil Service Commission. Bush sought, in addition, more extensive relief from the federal officials named as Defendants. Dissimilarly, Plaintiff Stephens has not obtained any relief, and the agency obtained dismissal of the companion case against the agency on the ground that there is no judicial remedy. Moreover, it is

apparent in this case that the agency remedies for an improper appointment have been fruitless and as applied to Stephens have been constitutionally inadequate to protect his statutory veterans preference, his administrative due process, and his constitutional rights. In *Bush*, the Supreme Court stated: "We need not reach the question whether the Constitution itself requires a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary. (at 379, fn. 14)." It is necessary under *Bush v. Lucas, supra*, to reach the constitutional issue in this case because the agency was dismissed in the companion case for lack of a remedy under the CSRA (unless a petition for certiorari is granted also in CA-8550 which results in a decision by this Court granting a remedy against the agency in favor of petitioner).

Bush v. Lucas did not depreciate the existing remedies for a federal employee to seek judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq*. To the contrary, *Bush v. Lucas* indicates that the "federal court's statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation." There is no directive in the CSRA which repeals prior existing remedies for federal employees to seek judicial relief against individual agency officials. Congress could have easily done so if that were its intention. However, in the absence of "meaningful remedies" being provided under CSRA for Plaintiff's relief, *Bush v. Lucas* does not bar this action. *See Bush* at 368. Plaintiff unsuccessfully sought to amend under Rule 15 (a), F.R. Civ. P., to also seek equitable relief under 28 U.S.C. § 1361 against the federal defendants. Plaintiff should be entitled to prosecute this action for equitable relief against Defendants even if *Bush v. Lucas* prevented monetary relief and denied damages for constitutional and statutory violations.

In the recent case of *United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668, 98 L. Ed. 2d 830 (1988), the concurring opinion of Mr. Justice Blackmun reaffirms that the Constitution supports a private damage action against a federal official for constitutional violations. There is no language in *Fausto* which holds that

Plaintiff's statutory right to a veterans preference (preference rights were not granted to him in the agency's consideration of his application) can be abrogated by the failure of the Civil Service Reform Act to provide a remedy. The only outlet for Plaintiff's complaint mentioned in the Civil Service Reform Act is to file a complaint with the Office of Special Counsel. This is not a remedy, merely a right to protest to an administrative officer who in turn has the authority to request a remedy. (Special Counsel declined any action in this matter). The appointment to fill the position of Regional Attorney was advertised on an external basis. As an external appointment, Plaintiff was entitled to veterans preference rights which the record indicates were not granted. If, as the defendant agency in the companion case argues, Plaintiff is not entitled to relief against the agency; and if in the present case Plaintiff is not entitled to relief against the individual Defendants for these statutory transgressions, this court is being asked to affirm the denial of any relief in the face of statutory veterans preference violations. *Fausto* cannot be fairly construed to run roughshod over the statutory rights of Plaintiff. Plaintiff has alleged specific constitutional deprivations in his complaint and amended complaint filed in the companion case against the agency, on appeal as CA-8550, attached to and adopted by reference in this case against two individual officers of the agency (R. 1, par. 7). As succinctly stated in Mr. Justice Blackmun's concurring opinion, *Fausto* makes no inroads on the accepted proposition that "the Constitution itself supports a private damages action against a federal official." *Fausto, supra*, at 108 S.Ct. 677. Furthermore, *Fausto* is distinguishable both in fact and in legal context. If fact, *Fausto* was a non-preference eligible employee; Plaintiff is a preference eligible veteran who is accorded preferential treatment both under the Civil Service Reform Act (*See Fausto, supra*, 108 S.Ct. at 670, fn. 1) and the 5 U.S.C. §§ 3318 and 3320 provisions of the Veterans Preference Act. (*See Bush v. Lucas*, 462 U.S. 367, 110 S.Ct. 2404, 2415, fn. 28, 76 L. Ed.2d 648 (1983). In legal context, *Fausto* sought relief against the agency to obtain back pay for a thirty (30) day suspension. The majority opinion only determined that there was no Tucker Act

jurisdiction for a back pay award; and did not have occasion to address whether any action would lie against an individual federal officer for damages. The concurring opinion of Mr. Justice Blackmun, which was the deciding vote, pointedly preserved the *Bivens* remedy of a constitutional tort and the Court's common law power to vindicate constitutional rights. *See Fausto, supra*, 108 S.Ct. at 677.

Defendants rely upon *Schweiker v. Chilicky*, ___ U.S. ___, 108 S. Ct. 2460 (1988), which represented a mammoth "social problem" arising from demonstrated mismanagement and resulting injustices in the administration of the social security system. The majority opinion recited the elaborate machinery set up by the Congress to review the claim of dissatisfied claimants although the Social Security Act makes no provision for money damages against federal officials responsible for wrongful denials of benefits. In distinction, Plaintiff, a preference eligible veteran who is granted grievance rights has not even been permitted an impartial agency review of his claim — his grievances have been rejected on erroneous legal grounds and no fact finder has been appointed under agency grievance processes to impartially gather the facts or hold a hearing. As determined by the Supreme Court, the Congress has given intensive attention to the "continuing disability review" program implemented by the Social Security Administration. Conversely, the plight of the Plaintiff whose grievance remedies have been administratively annulled and whose veterans preference rights have been violated, has gone unnoticed by the Congress. There is no presumption available that Congress has, as in *Chilicky*, considered but determined that Plaintiff's rights are not reviewable in a federal district court. Giving balance to *Chilicky* is the recent case of *Webster v. Doe*, 486 U.S. 592, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988), in which the court permitted review under the Administrative Procedure Act (APA) to address the Plaintiff's constitutional claim and the propriety of the equitable remedies which he sought as a result of being discharged from the CIA. *Webster v. Doe, supra*, emphasizes the Court's reaffirmance of the role of the district court to review federal personnel cases under the APA which involve more than minor disci-

plinary matters such as in *Doe*. Plaintiff Bush who collected a back pay award; plaintiffs in *Chilicky* who collected back benefits; and plaintiff Fausto, whose Merit System Protection Board appeal reduced a discharge to a thirty (30) day suspension were denied further relief. The appropriate deduction from these cases is that the Supreme Court will permit relief when there is no other remedy, such as in *Doe*, for redressing a wrong to a federal employee.

The lower courts erroneously rejected Plaintiff's constitutional claim for failure to state a claim.

III.

REJECTION OF PERSONAL JURISDICTION

WHETHER THE LOWER COURTS IMPERMISSIBLY MINIMIZED THE BREADTH OF THE NATIONAL FEDERAL OFFICIAL VENUE STATUTE AT 28 U.S.C. § 1391 (e) BY DETERMINING THAT THERE WAS NO PERSONAL JURISDICTION OVER FEDERAL OFFICIALS SUED IN GEORGIA.

Plaintiff sought service of Defendants by mail under F.R. Civ. P. 4 (c) (2) (C) (ii). The method of service by regular mail is permissible means of service outside the state of the forum; however, mail service must be acknowledged by defendant. After Plaintiff performed mail service by this method, Defendant federal officials refused to acknowledge service under this rule, and therefore this attempted service was ineffective. After receipt of Defendants' motion challenging service, an order was entered on November 4, 1987, ordering personal service upon Defendants by the United States Marshal. This personal service was made under the Georgia Long Arm Statute, O.C.G.A. § 9-10-94. Pursuant to the order, service was made by the Deputy United States Marshal of the District of Columbia on November 24, 1987, upon Defendants by leaving the process with Doral Butler, an employee of HHS (R.8), who is authorized to accept service upon officers and employees sued in their official capacity. (R. 10, Ex. 1). Defendants again challenged service on the ground that Ms. Doral

had no authority to accept service where Defendants were named in their individual capacity (though for official actions). Plaintiff requested personal service again on Defendants by the United States Marshal and this service was personally made upon Defendants on February 12, 1988 (R. 11).

B. Personal Jurisdiction

28 U.S.C. § 1391 (e) provides:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of the action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

In this case, Plaintiff resides in the Northern District of Georgia, and, therefore, under the federal venue statute the action was properly brought in this district. In addition, the cause of action arose in this judicial district. However, the district court determined that there was no personal jurisdiction over Defendants. Maintenance of the suit in Georgia does not offend "traditional notions of fair play and justice". *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The suit's factual focus is the failure to appoint Plaintiff, then Acting Regional Attorney in Atlanta, to the position of Regional Attorney in Atlanta. The appointment was located in the Northern District of Georgia. Plaintiff was notified in Atlanta by telephone call from Defendant Coleman in Washington, D.C., that he would not be selected. Defendant Dunst came to Atlanta to interview Plaintiff and two other candidates for the appointment. Interviews were conducted of the Regional Director in Atlanta and the Regional Social Security Commissioner in Atlanta. Atlanta is one of the seven regional headquarters of the Department of Health and Human

Services (HHS), the agency advertising the vacancy for the regional position. The HHS has chosen Atlanta in this district as a primary place where it desires to conduct business. Officers of the agency, such as Defendants, conduct business regularly in the regional office and often make personal visits. When an agency official is alleged to have committed a tortious act for having violated a veteran's preference rights, or having failed to accord administrative due process to Plaintiff in processing his grievances, or having violated Plaintiff's constitutional rights, there is no unfairness to Defendants in seeking accountability in federal court in a state where the vacancy occurred and where the appointment was filled. *See Bracewell v. Nicholson Air Service, Inc.*, 680 F.2d 103 (11th Cir., 1982); and subsequent appeal at 748 F.2d 1499. The Regional Director of the agency is located in Atlanta. The federal business of the agency in the Southeast is conducted from the regional headquarters in Atlanta. The Secretary of the agency has a personal representative located in Atlanta. The District Court concluded that a federal official named in an individual capacity for an act committed in the scope of duty would be burdened by defense of the action in Georgia. The agency has a sizable legal staff in Atlanta composed of approximately 40 attorneys, the Civil Division of the U.S. Attorney's office in this district has a sizable contingent, the Justice Department attorneys handling the case in Washington are constantly practicing in district courts throughout the nation. There is no proffer by Defendants that they have been or will be burdened by defending in the Northern District of Georgia.

The district court assumed that the "records are likely stored in Washington" as a "reasonableness" factor in determining that there is insufficient contact with this district. However, discovery was concluded and all records purportedly available have been produced except for some which were stated to be destroyed and others withheld which are the subject of Plaintiff's FOIA Count in CA-8550. The availability of records is not a reasonable factor.

The district court's remark that a majority of the witnesses are in Washington is equally untenable as there is no proof or evi-

dence on this, only again the supposition of the district court. Plaintiff, Chief Counsel Granger, Deputy Chief Counsels named to the duties formerly exercised by Plaintiff, former Regional Attorney Carl H. Harper, and other present and former employees of the Atlanta Regional Office are possible witnesses and likely outnumber potential witnesses in Washington.

In addition to the "contacts" identified in Plaintiff's complaint and addressed in Plaintiff's pleadings which subject Defendants to the jurisdiction in Georgia, Plaintiff's motion to amend and the attached amendment, which was denied, set out continuing actions by the Chief Counsel of Region IV (Atlanta) which occurred in Atlanta, and deprived Plaintiff of his then position of Deputy Chief Counsel (R. 17). The agency created two new positions of Deputy Chief Counsel which absorbed Plaintiff's former duties; and Plaintiff was not chosen for either position. The scene for these acts of retaliation was indisputably the Atlanta office. It is alleged in the proposed amendment that at least one of the Defendants was a party to these actions (R. 17, par. 16). By denying leave to file Plaintiff's amendment, the district court found it unnecessary to address the continuing series of "contacts" in Atlanta which further retaliated against Plaintiff and also punished Plaintiff for filing the suit against the individuals. The district court's indication that the amendment was not timely is refuted by the fact that the selections for the newly created positions of Deputy Chief Counsels, which Plaintiff applied for, were not announced until December 7, 1988. Plaintiff's motion to amend was filed on January 24, 1989.

The district court myopically reviewed the activity of a giant federal agency which is regionalized for efficient operating purposes as if it were a private recruiting agency located in the Washington area which only made a few phone calls to Plaintiff and sent someone down from Washington to interview Plaintiff. HHS is not a private corporation or even a localized or quasi-private federal agency operating only in a small geographic or specialized area. An agency such as HHS and its employees are often named as defendants in whichever district a dispute arises. Any

testimony by a Defendant official, both being highly trained attorneys, that he or she could not reasonably anticipate being named as a defendant in a suit for damages arising from official actions, where the agency pleaded a species of immunity, would not be credible. There are no laws of the state of Georgia which would subject Defendants to any disadvantage in filing an Answer and defending in the Northern District of Georgia as opposed to the District of Columbia or any other district. There being an apparently strong federal interest in operating a regionalized federal agency system, there is no federal policy or interest in confining all suits against federal officials to the District of Columbia. The federal official venue statute of 28 U.S.C. § 1391 (e), *supra*, indicates the intent of Congress to permit actions where a plaintiff resides and where the action arose. Citizens and federal courts of Georgia and the Southeast have the same genuine interest in preserving the integrity of the civil service system as the citizens and courts of other areas, including the District of Columbia.

CONCLUSION

It is requested that a Writ of Certioriari be issued to the Court of Appeals for the Eleventh Circuit for review of the issues presented in this petition.

Respectfully submitted,

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August 20, 1990

Appendix A

James N. STEPHENS,
Plaintiff-Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Secretary,
Defendant-Appellee.

James N. STEPHENS,
Plaintiff-Appellant,

v.

Terry S. COLEMAN, Isabel P. Dunst,
Defendants-Appellees.

Nos. 89-8550, 89-8551.

United States Court of Appeals, Eleventh Circuit.

May 23, 1990.

Appeals from the United States District Court for the Northern District of Georgia.

Before KRAVITCH, Circuit Judge, and RONEY* and ALDISERT**, Senior Circuit Judges.

ALDISERT, Senior Circuit Judge:

The major question presented in these appeals by James N. Stephens, Deputy Regional Attorney of the Department of Health and Human Services (HHS), who was an unsuccessful candidate

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* See Rule 34–2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Ruggero J. Aldisert, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

for the office of Regional Attorney, is whether the district court properly concluded that the grievance procedure set forth in the Civil Service Reform Act of 1978 (CSRA), codified and amended in various sections of 5 U.S.C., precludes federal court review of an alleged "prohibited personnel practice," where the Office of Special Counsel declines to petition the Merit Systems Protection Board for consideration of the complaint. Appellant also alleges the district court erred by: 1) refusing to compel the HHS to turn over records pursuant to a Freedom of Information Request (FOIA); 2) erroneously approving HHS' failure to grant appellant a veterans' preference; and 3) failing to exercise personal jurisdiction over two government employees. Because we hold that the administrative procedure set forth in the CSRA and approved in *United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988) precludes judicial review in this case, and that the collateral claims asserted have no merit, we affirm the judgment of the district court.

Jurisdiction was proper in the trial court based on 28 U.S.C. § 1331. We have jurisdiction on appeal pursuant to 28 U.S.C. § 1291. The appeal was timely filed under Rule 4(a), F.R.A.P.

Stephens' substantive claims based on his non-selection and all allegations of injustice stemming from the grievance procedure were dismissed for failure to state a claim. The standard of review for a motion to dismiss is the same for the appellate court as it was for the trial court. On a motion to dismiss, the facts stated in appellant's complaint and all reasonable inferences therefrom are taken as true. *Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th Cir.1988).

The district court granted summary judgment as to the FOIA request. When this court reviews the grant of a motion for summary judgment, all the facts and inferences therefrom are viewed in the light most favorable to the appellant. *Sweat v. Miller Brewing Co.*, 708 F.2d 655, 656 (11th Cir.1983).

Whether the district court correctly determined that Stephens was not subject to a veterans' preference is a mixed question of

law and fact. As to the fact portion of the mix, we apply the clearly erroneous rule. As to the legal component we will apply the plenary review standard. *See United States v. Wilson*, 894 F.2d 1245 (11th Cir.1990).

I.

In May of 1985, the HHS Office of General Counsel (OGC) announced a vacancy for the position of Regional Attorney (now called Chief Counsel), Region IV, Atlanta, Georgia. Stephens, who had been acting Regional Attorney for seven months, applied for the position. He asserts he was extremely qualified for the position, having been ranked number three in his class at Wake Forest Law School, a Deputy Regional Attorney for 11 years and having been assigned numerous important projects during his 21 years at HHS. Mr. Stephens was notified on August 14, 1985, that Mr. Granger had been appointed to the position.

A.

In September of 1985, appellant filed a grievance with the OGC, alleging that the selecting officials had not followed HHS or federal regulations in selecting the Regional Attorney. While his grievance was pending, appellant sought various documents relating to the appointment of Granger as Regional Attorney through a Freedom of Information Act (FOIA) request.

Appellant filed a second grievance with OGC on October 25, 1985, alleging additional errors in the selection process. This grievance was rejected on November 19, 1985. Appellant's subsequent request for an investigation and hearing by another hearing officer was rejected on January 30, 1986. While these grievances were pending, appellant filed a discrimination complaint with HHS. The discrimination complaint was based on the same facts as the two prior grievances. Appellant failed to notify the grievance official of the pending HHS grievance. HHS, accordingly, refused to reconsider dismissal of the grievance.

Stephens subsequently filed a grievance with the Office of Special Counsel (OSC) of the Merit System Protection Board (MSPB), a special independent ombudsman-type official. 5 U.S.C. § 1205. The OSC concluded that the regulations claimed to have been violated by HHS did not apply to Stephens because he was an exempt employee. Additionally, the OSC refused to address the discrimination issues alleged because it was office policy to leave those issues to determination by the Equal Employment Opportunity Commission. The OSC, therefore, declined to petition the Merit Systems Protection Board for consideration of Stephens' complaint. By operation of the statute describing the Office of Special Counsel, all review ended when that office declined to petition the Board for consideration of the grievance. 5 U.S.C. § 1214.

B.

On August 26, 1986, appellant filed an action in district court challenging HHS' decision not to promote him, the rejection of his grievance, and the failure of HHS to release all documents requested in his FOIA request (complaint I). He alleged that: 1) HHS had violated the Administrative Procedure Act (APA) by not complying with various statutes and regulations during the selection process and the grievance procedure; 2) he was denied due process by HHS' failure to grant him a veterans' preference; 3) HHS violated his due process and equal protection rights; and 4) HHS improperly withheld information requested pursuant to the FOIA. The complaint was amended to allege that appellant had been penalized in promotion because he refused to provide derogatory information about his former supervisor. He also added a claim for damages to his reputation by non-selection for the position of Regional Attorney.

In August 1987, he filed a companion case against the individual defendants, Coleman and Dunst (complaint II), seeking essentially the same relief only to the extent relief is determined to be unavailable against defendant in complaint I. The complaint of August 1987 required the court to exercise personal jurisdiction

over Mr. Coleman and Ms. Dunst based on their participation in appellant's non-selection. Appellant asserted a *Bivens* claim against the two defendants in their individual capacity for their alleged deprivation of his constitutional entitlement to a veterans' preference. He again argued that he was entitled to a veterans' preference.

On April 5, 1989, the district court dismissed the promotion and grievance counts and granted appellee's motion for summary judgment on the FOIA claim in complaint I. The court held that the Civil Service Reform Act provided the exclusive remedy for the personnel actions alleged. The court did review the claim as to the veterans' preference but concluded that the preference was only available for initial appointment or retention of job. Because the position of Regional Attorney would have been a promotion for Stephens, a veterans' preference was not available. *Stephens v. Secretary, Dep't of Health and Human Servs.*, No. 1:86-CV-1875-HTW, at 13, ___ F. Supp. ___, ___ (April 5, 1989) [hereinafter *Stephens I*]. As to the FOIA claims, the court held that appellant had been provided with the information most relevant to his non-selection and that the additional material was properly withheld pursuant to 5 U.S.C. §§ 552(b)(5) and (6). *Stephens I*, at ___ - ___.

The district court dismissed complaint II for lack of personal jurisdiction and failure to state a claim. The court concluded that "plaintiff may not obtain *Bivens* relief against federal officials in their individual capacities in this case as Congress has provided comprehensive procedural and substantive provision which give meaningful remedies against the United States by way of the CSRA." *Stephens v. Coleman*, 712 F.Supp. 1571, 1581 (N.D.Ga.1989) (relying on *Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988); *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983)).

II.

Stephens' main contention, and the only contention we will discuss at length, concerns the preemptive effect of the CSRA. This argument takes three tracks. First, he contends that the CSRA

is not the exclusive remedy for preference-eligible, exempt, federal employee relief. He next argues that even if we determine that private rights for "prohibited personnel practices" are preempted by the CSRA, the federal courts nevertheless have jurisdiction over his claim because he has asserted constitutional violations. Finally he argues that even if the CSRA preempts other judicial review, he still has a *Bivens* action against Coleman and Dunst in their individual capacities.

Stephens also contends that the district court erred in entering summary judgment in favor of HHS by determining that certain materials sought by him under the Freedom of Information Act ("FOIA") are exempt from disclosure. He challenges the ruling that he was not entitled to a veterans' preference. Finally, Stephens asserts that the district court erred in dismissing his complaint against Coleman and Dunst for lack of personal jurisdiction. We agree with the district court's personal jurisdiction conclusion, but it will not be necessary to discuss this point because we conclude that the trial court did not err in its alternatived basis for dismissal—that Stephens' contentions on the merits may not survive a motion to dismiss.

III.

Stephens argues that the CSRA is not the exclusive remedy for federal employees, alleges that the statute does not state that it is exclusive and does not cover all employee personnel actions. He contends that the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and mandamus, 28 U.S.C. § 1361, were designed to provide an additional remedy for aggrieved federal employees in the federal courts. In support of this view, he relies on pre-CSRA procedures, suggesting that the APA was available to preference-eligible, exempt federal employees claiming statutory violations. *See Kletschka v. Driver*, 411 F.2d 436 (2d Cir.1969). He argues that no court should restrict judicial review absent a "showing of 'clear and convincing' legislative intent." *See* Brief for Appellant at 40 (citing *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 105 S.Ct. 162, 84 L.Ed.2d 674 (1985)). He acknowledges the

existence of a preemption line of cases, but suggests that we have rejected those cases. *See Grier v. Secretary of the Army*, 799 F.2d 721 (11th Cir.1986); *Gleason v. Malcom*, 718 F.2d 1044 (11th Cir. 1983). Stephens asserts that the mere fact the CSRA provides for review of certain personnel actions by the OSC, then the MSPB and in some cases the Federal District Court or the Court of Claims, does not evince an intent by Congress to deny APA review in those cases where the CSRA does not provide for review by the MSPB. Indeed, he argues such an interpretation would frustrate the reformative intent of the CSRA by denying review of an agency's failure to follow its own procedures. Appellant says he is not seeking review of the merits of his grievances in this court, but rather a review of the agency's misconduct in handling his grievance.

Unfortunately for the appellant, his multitudinous, voluminous and extremely innovative arguments have been foreclosed by the Supreme Court. In *United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988), the Court held than an exempt, non-preference, federal employee, who had exhausted his administrative grievance procedures and was not provided further avenues for relief or appeal under the administrative review provisions of the CSRA, did not have a right to bring an action in federal court against the government for the alleged prohibited personnel practice. *Id.* at 447-52, 108 S.Ct. 677-79. The court faced head on the argument that pre-CSRA statutes and case law would have provided the employee with review and rejected the contention outright. *Id.* at 454-55, 108 S.Ct. 680-81. The court held that the CSRA was now the exclusive remedy of the federal employee. We believe *Fausto* applies to preference-eligible as well as non-preference employees.

We hold that under *Fausto*, and a number of cases of the U.S. Courts of Appeals, the CSRA is Stephens' exclusive remedy. *See, e.g., Towers v. Horner*, 791 F.2d 1244, 1246 (5th Cir.1986); *Schrachta v. Curtis*, 752 F.2d 1257, 1260 (7th Cir.1985). Cases in this court are not to the contrary. Although our decisions in *Grier* and *Gleason* were made after the effective date of the CSRA, and

permitted APA review, they failed to mention the CSRA. More importantly, both cases were decided before *Fausto*, which emphatically and conclusively established the preemptive nature of the CSRA. *See Grier*, 799 F.2d 721; *Gleason*, 718 F.2d 1044.

Moreover, the APA expressly excepts review where the relevant statute "preclude[s] judicial review," 5 U.S.C. § 701(a)(1), or where the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). "[T]he comprehensive nature of the . . . CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA, or not at all." *Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir.1984). The same argument applies to appellant's request for mandamus, 28 U.S.C. § 1361. No right to mandamus exists where other adequate remedies are available. *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir.), *cert. denied*, 449 U.S. 832, 101 S.Ct. 100, 66 L.Ed.2d 37 (1980). The CSRA provides other adequate remedies. *Towers v. Horner*, 791 F.2d 1244, 1247 (5th Cir.1986).

We conclude that the holding of *Fausto* is applicable to a preference-eligible federal employee, like Stephens, as well as a non-preference eligible employee, as was before the court in *Fausto*.

IV.

Stephens' argument based on alleged deprivations of constitutional rights also cannot carry the day. He is simply recharacterizing the basis of his APA claim as a constitutional violation. The Supreme Court has recently explained that it will not permit additional remedies for alleged constitutional violations where "Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Chilicky*, 487 U.S. at 413, 108 S.Ct. at 2462. The CSRA provides adequate remedial mechanisms. *See, e.g., Pinar v. Dole*, 747 F.2d 899, 910-11 (4th Cir.1984) (CSRA mechanisms preclude all other judicial intervention), *cert. denied*, 471 U.S. 1016, 105 S.Ct. 2019, 85 L.Ed.2d 301 (1985); *Lombardi v. Small Business Admin.*, 889 F.2d 959, 961 (10th Cir.1989)

(employee terminated for alleged infringement of first amendment rights did not have *Bivens* action or injunctive relief available as a remedy).

V.

Stephens' final argument that he is entitled to federal court review of this alleged prohibited personnel practice takes the form of a *Bivens* claim. Stephens asserts he has "a legitimate entitlement to a veteran's preference, to a hearing on his grievance, and to the issueance of a validly processed and validly issued appointment certificate to the vacancy for which he applied." Brief for Appellant at 21. He sees this as both a liberty and a property interest and says that deprivation of these rights are prohibited by the equal protection and due process clauses of the fifth amendment. He also claims that his first amendment rights were violated when he was retaliated against for refusing to criticize his former employer. Therefore, he believes he is entitled to bring a *Bivens* action.

In support of this conclusion, he relies principally on the concurring opinion of Justice Blackmun in *United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988), stating "this court has long recognized that the Constitution itself supports a private damages action against a federal official." *Id.* at 455, 108 S.Ct. at 681 (citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)). He attempts to distinguish *Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988) by contending that Congress has not decided that his rights are not reviewable in federal court, as was the case of the Social Security Act in *Chilicky*.

Stephens also relies on the distinction set forth in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) between a public employee speaking as a citizen about matters of public concern instead of as an employee speaking about matters only of personal interest:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. . . .
>
> . . . [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 146-147, 103 S.Ct. at 1690. *See also, Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 2898, 97 L.Ed.2d 315 (1987) (threshold question is whether speech is on a matter of public concern).

Finally, he argues, somewhat irrelevantly, that *Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) emphasizes the court's reaffirmance of the district court's role in reviewing federal personnel decisions under the APA.

A *Bivens* action is only permitted where 1) the petitioner has no alternative means of obtaining redress, and 2) there are no "special factors counseling hesitation." *Bivens*, 403 U.S. at 396-97, 91 S.Ct. at 2005.

> [W]hen the design of a Government program suggests that Congress has provided what it considers to be adequate remedies for constitutional violations that may occur in the course of the program's administration [we have not created additional *Bivens* remedies].

Chilicky, 487 U.S. at 424, 108 S.Ct. at 2468; *see Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). In addition, this court has recognized that the comprehensive statutory scheme

established by Congress relating to federal employment (CSRA) precludes the maintenance of job-related Bivens actions by federal employees. *McCollum v. Bolger*, 794 F.2d 602, 607 (11th Cir.1986), *cert. denied*, 479 U.S. 1034, 107 S.Ct. 883, 93 L.Ed.2d 836 (1987); *Wells v. FAA*, 755 F.2d 804, 810 (11th Cir.1985).

We agree with the district court that Stephens' contentions are limited to a matter of acute personal interest—a job; his contentions do not implicate the type of public concern discussed in *Connick*. Because we take this view, Stephens may find no solace in *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir.1988).

Finally, *Webster v. Doe* does not support appellant's position. There, suit was brought against the CIA's director in his official capacity for declaratory and injunctive relief for alleged constitutional and statutory claims. The Court held the constitutional claims were judicially reviewable. No "individual" liability was sought. *Webster* has nothing to do with *Bivens* actions. *Webster*, 486 U.S. 592, 108 S.Ct. 2407.

VI.

As to Stephens remaining contentions: that he was entitled to the entire promotion file in his Freedom of Information Act request, that he was entitled to a veterans' preference, and that the district court erred in concluding that it did not have personal jurisdiction over Coleman and Dunst for complaint II, we have reviewed the arguments and contentions raised by appellant and determine they are without merit.

The information requested by Stephens and not disclosed by HHS is privileged as "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5), or as an "unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The district court did not err when it refused to require HHS to produce these documents.

We conclude that the decision of the district court determining that Stephens' application for the position of Regional Attorney was an application for promotion is consistent with the facts and arguments set forth in the record. Therefore, we affirm the decision of the district court upholding HHS' decision not to grant Stephens a veterans' preference. *See Noble v. Tennessee Valley Authority*, 876 F.2d 1580, 1583, *appeal dismissed*, 891 F.2d 1013 (Fed.Cir.1989) (en banc).

Finally, we agree with the district court's refusal to exercise personal jurisdiction over Coleman and Dunst. Because of our holding as to the court's dismissal of the substantive claims, we have elected not to discuss this issue.

VII.

We have considered all contentions presented by the appellant in both appeals. The judgments of the district court are AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES N. STEPHENS,	:	
Plaintiff	:	
vs.	:	CIVIL ACTION
TERRY S. COLEMAN and	:	FILE NO. 1:87-CV-
ISABEL P. DUNST,	:	1785A-HTW
Defendant	:	

ORDER OF COURT

This matter is before the court on defendants' motion to dismiss, pursuant to Fed.R.Civ.P. 12 (b) (2), 12 (b) (5) and 12 (b) (6) and plaintiff's motion for leave to amend complaint filed on January 24, 1989. Both motions are opposed.

Plaintiff brought this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 701, et seq.; 5 U.S.C. § 2302 (b) (2), (6); 5 U.S.C. §§ 3318 and 3320; the First and Fifth Amendments of the United States Constitution and various other statutes and rules. Basically, plaintiff asserts that he was deprived of an appointment as Regional Attorney by defendants Coleman's and Dunst's failure to follow appropriate selection procedures in violation of plaintiff's constitutional rights guaranteeing free speech under the First Amendment and due process and equal protection under the Fifth Amendment.

STATEMENT OF FACTS

The facts of this case are basically undisputed. Plaintiff was employed by the Department of Health and Human Services ("HHS") as an attorney. In 1985, plaintiff applied for the position of Regional Attorney (now changed to Chief Counsel). Plaintiff was advised that he was not accepted for the position on August

13, 1985 and subsequently filed several grievances contending that the agency and various individuals "failed to follow appropriate HHS and federal regulations, rules and policies" in making the selection. The Office of General Counsel rejected plaintiff's grievances and request for an investigation and hearing.

Subsequent to the decisions on plaintiff's grievances, plaintiff filed suit against the Secretary of HHS on August 26, 1986, alleging arbitrary and capricious action in violation of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, and violation of his constitutional rights to procedural due process and equal protection (Civil Action File No. 1:86-CV-1875-HTW). The Secretary filed dispositive motions to dismiss the HHS complaint asserting that plaintiff's remedies under the Civil Service Reform Act of 1978 (CSRA), Pub. L. 95-454, 92 Stat. 1111, *et seq.*, were exclusive. Plaintiff then filed the instant action seeking substantially the same relief against defendants Coleman and Dunst individually "only in the event relief is determined to be unavailable against defendant in C86-1875A."

Defendants contend that, regardless of plaintiff's entitlement to relief in Civil Action Number 86-CV-1875, plaintiff's constitutional claims against defendants Coleman and Dunst in the present case are barred by the doctrine of *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), which precludes creating a judicial remedy for claims arising out of federal employment relations. Defendants also contend that the court lacks personal jurisdiction over the defendants and that neither defendant was properly served, thereby entitling defendants to dismissal with prejudice pursuant to Fed.R.Civ.P. 12 (b) (2), 12 (b) (5) and 12 (b) (6).

I. PERSONAL JURISDICTION

Defendants contend that this case should be dismissed because this court lacks jurisdiction over their person and state as bases that defendants have not properly been served and that defendants are non-residents and not subject to the personal jurisdiction of this court.

In plaintiff's response to defendant's motion to dismiss, he concedes that service of process was initially ineffective. Plaintiff states in his response that he has taken steps to perfect service under the Georgia Long Arm Statute, O.C.G.A. § 9-10-94 and that defendants' motion contesting service is or will be mooted.

Plaintiff cites 28 U.S.C. § 1391 (e) either in an effort to show that this court has personal jurisdiction over defendants or to establish venue. However, this section is inapplicable to a determination of personal jurisdiction. Unless personal jurisdiction can be obtained over defendants, it serves no purpose to determine whether venue could be established. Moreover, defendants have not challenged venue in this case.

Before a federal court may exercise personal jurisdiction over a defendant, there must exist both a constitutionally sufficient relationship between the defendant and the forum, i.e. minimum contacts, and a basis for the defendant's amenability to service of summons. *Omni Capital International Ltd. v. Rudolf Wolff & Co., Ltd.*, ____ U.S. ____, ____, 108 S.Ct. 404, 409, 98 L.Ed. 2d 415 (1987); *DeLong Equipment Company v. Washington Mills Abrasive Co.*, 840 F.2d 843, 847 (11th Cir. 1988).

The plaintiff has the burden of proof to establish jurisdiction in this court. *Morris v. SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988); *Brown v. Flowers Industries, Inc.*, 688 F.2d 328, 329 (5th Cir. 1982) *cert. denied*, 460 U.S. 1023 (1983). However, at this state in the proceedings when the motion is to be decided on affidavits and other evidentiary materials without a hearing, the plaintiff need only show a *prima facie* case. *DeLong Equipment*, 840 F.2d at 843. The court is obligated to deny the motion if the plaintiff alleges sufficient facts to support a reasonable inference that the defendant can be subjected to jurisdiction of this court. *Jackam v. Hospital Corporation of America Mideast, Ltd.*, 800 F.2d 1577 (11th Cir. 1986). Allegations which are not controverted by defendants' evidence must be accepted as true. *DeLong Equipment*, 840 F.2d at 843; *Morris*, 843 F.2d at 492. Conflicts in the facts are to be resolved in the plaintiff's favor for determining

if a *prima facie* case exists. *Morris*, 843 F.2d at 492; *DeLong*, 840 F.2d at 843; *Brown*, 688 F.2d at 332. The court will first address the service of process issue, then the minimum contacts issue.

A. SERVICE OF PROCESS

Fed.R.Civ.P. 4 (e) prescribes how process can be served on an out-of-state defendant in a federal civil case. Under this rule, if a federal statute containing a service of process provision is applicable to the case, service on an out-of-state defendant is made according to its terms. Fed.R.Civ.P. 4 (e). Absent such a provision, service is made under the circumstances and in the manner prescribed by the law of the state in which the district court sits. *DeLong Equipment*, 840 F.2d at 847; Fed.R.Civ.P. 4 (e).

As plaintiff has not asserted any statute which allows service of process under the facts alleged in the complaint, service must be pursuant to the Long Arm Statute of the State of Georgia. Service of process is perfected under that statute in the same manner as upon residents of the state. O.C.G.A. §§ 9-10-91 and 9-10-94. Plaintiff apparently alleges that defendants committed a tort. Section 9-10-91 permits the exercise of jurisdiction over a non-resident defendant for commission of a tort if he or she:

> (2) commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;
>
> (3) commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state; . . .

O.C.G.A. § 9-10-91 (2), (3). Plaintiff merely alleges in response to the motion to dismiss that defendant Dunst visited Georgia to interview him and that defendant Coleman made a telephone call to notify him that he did not receive the position for which he had

applied. No further facts or details of activity or conduct are stated. Plaintiff has not shown or even alleged that defendants purposefully did some act with or in the forum, that the legal injury he received arises out of or results from defendants' purposeful activity and that with the existence of these two factors, the exercise of jurisdiction would be reasonable. *See DeLong Equipment*, 840 F.2d at 849; *Schellenberger v. Tanner*, 138 Ga.App. 399, 404-05 (1976).

As plaintiff has not alleged facts in his complaint or in subsequent pleadings sufficient to make a proper determination, the court is unable to find that service of process met with the statutory requirements. The statute indicates that service of process cannot properly be made until it can be shown that personal jurisdiction may be obtained pursuant to O.C.G.A. § 9-10-91. Accordingly, the court determines that plaintiff has not demonstrated that the first part of the jurisdictional requirement has been satisfied. Conducting an interview and making a telephone call alone are not sufficiently significant to satisfy the terms of the long arm statute and to simultaneously allow service of process.

The record indicates that the individual defendants were personally served on February 12, 1988. Although process may have been personally delivered to the individual defendants, there is no evidence that such process was properly served in light of the above discussion. The court finds that plaintiff has not presented a *prima facie* case that defendants' activities permit the assertion of jurisdiction under the Georgia long arm statute or that service of process was proper and, therefore, has not met his burden.

B. MINIMUM CONTACTS

As previously mentioned, the court has been unable to locate facts in the complaint which relate to personal jurisdiction. In paragraph four plaintiff alleges jurisdiction under the First and Fifth Amendment of the Constitution of the United States, 28 U.S.C. § 1331 giving the district court original jurisdiction over all civil actions arising under the laws and Constitution of the United States; and 28 U.S.C. § 1332 under diversity of citizenship.

However, these allegations relate only to subject matter jurisdiction and cannot, without more, serve as a basis for asserting jurisdiction over the persons of non-resident defendants.

Defendants specifically argue in their motion to dismiss that jurisdiction is improper because it does not comport with due process. In his response to this argument, plaintiff states that he was notified in Atlanta by a telephone call from defendant Coleman from Washington, D.C. that he would not be selected for the position. He further states that Defendant Dunst came to Atlanta to interview plaintiff and two other candidates for the appointment. The other arguments made by plaintiff relate to contacts by the agency with the forum. Plaintiff further argues that when an agency official commits a tortious act, there is no unfairness to defendants in seeking accountability in a federal court in a state where the vacancy occurred and where the appointment was filled. Based on the foregoing, plaintiff argues that it would not be unfair nor offend traditional notions of fair play to assert personal jurisdiction over defendants in Georgia.

Defendants show by way of affidavit that Ms. Dunst has made only four trips to the State of Georgia. All trips were undertaken exclusively in her official capacity. Only two of such trips had any relationship to the facts of this case. Neither of those two trips lasted for more than twenty-four (24) hours. Ms. Dunst does not own, use, or possess any real property in the State of Georgia, derive income from goods consumed or disposed of or from services performed in the State of Georgia.

Defendants further show by way of the affidavit of Terry S. Coleman that, except for a one-week vacation in 1983, Mr. Coleman has not travelled to or visited the State of Georgia either on official business or for personal reasons. His contacts with the forum state consist of telephone calls to other government officials in the State in the normal course of conducting official business. Mr. Coleman does not own, use, or possess any real property in the State of Georgia, derive income from goods consumed or disposed of or from services performed in the State of Georgia.

In order to assert jurisdiction over non-resident defendants in a diversity action, the requirements of the long arm statute of the forum state and due process requirements of the constitution must be met. *Southwire Company v. Trans-World Metals and Company, Ltd.*, 735 F.2d 440 (11th Cir. 1984). The Supreme Court has repeatedly stated that the constitutional touchstone is whether the defendant purposefully established minimum contacts in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945). This court may exercise jurisdiction over a non-resident defendant in accordance with due process only if that defendant has "certain minimum contacts [with the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and justice.' " *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, ____ U.S. ____, 107 S. Ct. 1026 (1987), quoting *International Shoe Co. v. Washington*, 326 U.S. at 316. In order to satisfy the requirement of contact with the forum state it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Burger King*, 471 U.S. at 474-75, 105 S.Ct. at 2183; *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 1239-40 (1958) quoting *International Shoe Co. v. Washington*, 326 U.S. at 319. It is critical in a due process analysis that defendant's conduct in connection with the forum state is such that he should reasonably anticipate being haled into court there. *Burger King*, 471 U.S. at 474, quoting *Worldwide Volkswagen*, 444 U.S. at 297.

Once it is decided that a defendant purposefully established minimum contacts with the forum state, the contacts must be considered in light of "reasonableness" factors to determine whether the assertion of personal jurisdiction would comport with traditional notions of fair play and substantial justice. *Burger King*, 471 U.S. at 476, 105 S.Ct. at 2184. These factors include, among others, the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief and the interstate judicial system's inter-

est in obtaining the most efficient resolution of controversies. *Id.* at 477, 105 S.Ct. at 2184.

Plaintiff discusses various contacts that defendants had with this state or with plaintiff in this state in their official capacities or that defendants' agency has with this state. Such contacts in and of themselves, cannot serve as a basis for obtaining personal jurisdiction over defendants. *See e.g., DeLong Equipment*, 840 F.2d at 852 (defendants must have committed some act in the forum for which they can be held personally liable). As this suit seeks relief against the defendants personally, rather than against the resources of the United States, plaintiff must prove that this court has personal jurisdiction over the individual defendants without regard to the agency. *Griffith v. Nixon*, 518 F.2d 1195 (2d Cir. 1975), *cert. denied*, 423 U.S. 995 (1975); *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974).

Plaintiff must assert specific personal jurisdiction, founded on defendants' contacts with the forum state which are related to the cause of action. *See DeLong Equipment Co.*, 840 F.2d at 853. The only contact that plaintiff alleges Ms. Dunst had with this forum is her coming to Georgia to conduct his interview. The record shows that Ms. Dunst made four visits to the forum state, all of which were in her official capacity. There is no indication of her personal activity, tortious or otherwise.

Upon review, the court does not determine that these contacts show that Ms. Dunst purposefully availed herself of the privilege of conducting activities in this forum or that she would reasonably anticipate being haled into court in Georgia. Plaintiff has not given sufficient information relative to Ms. Dunst's activities or contacts as they pertain to plaintiff while on these visits. Therefore, the court determines that plaintiff has not alleged sufficient facts to support a reasonable inference that Ms. Dunst could be subjected to the jurisdiction of this court.

Even if the court determined that Ms. Dunst had sufficient contacts with this state based on the contacts established, these contacts must be considered in light of the "reasonableness" fac-

tors. The records are likely stored in Washington, and the majority of the witnesses who would testify about the administration of the system in general and as it specifically relates to this case are presumably in Washington. Therefore, the case could be more efficiently handled in that forum.

Additionally, plaintiff has not provided any evidence of the forum state's interest in adjudicating this matter. Such interest appears to be insubstantial in light of the Supreme Court's ruling that the administration of a federal personnel system is of national interest and the design of such system should be left to Congress. Moreover, defendant Dunst would be burdened by having to litigate an action in a forum where she has basically no contacts. An evaluation of the "reasonableness" factors indicate that such assertion would not comport with traditional notions of fair play and substantial justice.

Mr. Coleman's contacts with the forum are practically nonexistent. They consist of telephone calls to the state and a vacation in 1983. The only telephone call that relates to this cause of action was one to plaintiff advising that he had not been selected for the position of Regional Attorney. These actions are insufficient to subject Mr. Coleman to the jurisdiction of this court.

Upon review of the record, the court determines that plaintiff has failed to establish the necessary minimum contacts with the State of Georgia, with respect to the allegations of the complaint, to give this court jurisdiction over defendants. Therefore, this court concludes that based on the record in this case, this action may properly dismissed as to Terry S. Coleman and Isabel P. Dunst for lack of personal jurisdiction, pursuant to Fed.R.Civ.P. 12 (b) (2).

II. FAILURE TO STATE A CLAIM

Defendants contend that an application of *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) requires that the complaint be dismissed for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12 (b) (6). The court

should deny a motion to dismiss for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Generally, the allegations of a complaint are to be liberally construed. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594 (5th Cir. 1981). However, if it is clear from the complaint that plaintiff could prove no set of facts that would entitle him to relief, the complaint should be dismissed. *Madison v. United States*, 752 F.2d 607 (11th Cir. 1985).

A. APPLICATION OF *BUSH v. LUCAS*

In *Bush*, as in the present case, the plaintiff was employed within the Civil Service Reform Act (CSRA), which establishes standards and provides authority for the government to take actions necessary to ensure adequate employee performance and conduct. *See Harrison v. Bowen*, 815 F.2d 1505, 1509 (D.C. Cir. 1987). The CSRA provides a remedial scheme through which employees may vindicate the substantive rights provided by CSRA. The remedial scheme provides, in relevant part, as follows:

> (1) for major personnel actions specified in the statute ("adverse actions"), direct judicial review after extensive prior administrative proceedings;
>
> (2) for specified minor personnel actions infected by particularly heinous motivations or disregard of law ("prohibited personnel practices"), review by the Office of Special Counsel, with judicial scrutiny "limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry" (citation omitted); and
>
> (3) for the specified minor actions not so infected, and for all other minor personnel actions, review by neither OSC nor the courts.

Carducci v. Regan, 714 F.2d 171, 175 (D.C. Cir. 1983); CSRA, § 1 *et seq.*, 92 Stat. 1111. An "adverse action" under item one above would include removal, suspension for more than 14 days, reduction in pay or grade, and a furlough of 30 days or less, pursuant to 5 U.S.C. § 7512. Plaintiff claims that he was improperly denied a promotion and does not contend that the actions of defendants in this case are included in the definition of "adverse action." Plaintiff does contend, however, that defendants' actions constitute "prohibited personnel practices" as referenced in item two above and defined at 5 U.S.C. § 2302 as including:

> (1) discriminat[ion] for or against any employee or applicant for employment —
>
> (B) on the basis of age . . .;
>
> (2) solicit[ation] or consider[ation of] any recommendation or statement . . . with respect to any individual who . . . is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records or the person furnishing it . . .;
>
> (6) grant[ing] any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition for the requirements of any position) for the purpose of improving or injuring the prospects of any particular person for employment;
>
> (10) discriminat[ion] for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others;
>
> (11) tak[ing] or fail[ing] to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or di-

> rectly concerning, the merit system principles contained in section 2301 of this title. . .

5 U.S.C. § 2302 (b). Specifically, plaintiff alleges that the defendants, among other things, failed to seek comments from plaintiff's past supervisor, improperly considered criteria outside the selection criteria, failed to give appropriate weight to plaintiff's experience, failed to give plaintiff a veterans preference and as a result improperly denied plaintiff the position of Chief Counsel, Region IV, Atlanta, Georgia. As these allegations are clearly within the above definition of a "prohibited personnel practice," plaintiff's remedy is as set forth in the second provision, that is, he must seek review by the Office of Special Counsel. (Neither party contends that plaintiff's claims are for actions described in the third provision, for which review by neither OSC nor the courts is available.) In this situation, judicial scrutiny is "limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry." The record before the court shows that the OSC made sufficient inquiry into plaintiff's claims. Moreover, that is not the basis of plaintiff's complaint.

Plaintiff argues that this limitation on the judiciary should not apply to cases in which relief is denied against the government itself and the individual is relegated to a position of seeking relief against government officials in their individual capacities. Plaintiff relies heavily on Justice Blackmun's statement in his concurring opinion in *United States v. Fausto*, ____ U.S. ____, 108 S. Ct. 668 (1988), that "this court long has recognized that the Constitution itself supports a private damages action against a federal official." *Fausto*, 108 S.Ct. at 677.

However, the Supreme Court subsequently decided the case of *Schweiker v. Chilicky*, 56 U.S.L.W. 4767 (U.S. June 24, 1988), which further clarifies when money damages may be awarded against government officials in an individual capacity. In *Chilicky* respondents had initially sought relief against petitioners in their official and individual capacities. *Chilicky*, 56 U.S.L.W. at 4769. When the case was dismissed based on qualified immunity, re-

spondents appealed, pressing only their claims for money damages against petitioners in their individual capacities. *Id.*

The *Chilicky* Court noted that *Bivens*[1] actions against federal officers have been permitted but stated that in such cases there were no special factors counselling hesitation in the absence of affirmative action by Congress, no explicit statutory prohibition against the relief sought and no exclusive statutory alternative remedy.

> Special factors counselling hesitation in the absence of affirmative action by Congress has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies.

Schweiker v. Chilicky, 56 U.S.L.W. at 4770.

In *Bush*, the Supreme Court directed the judiciary to "pay particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Bush*, 462 U.S. at 378, 103 S.Ct. at 2411. The Supreme Court found that the unique nature of the federal personnel system was a special factor which counsels such hesitation and bars *Bivens* actions. 462 U.S. at 372, 103 S.Ct. at 2408. The court further stated:

> The question is not what remedy the court should provide for a wrong that would otherwise go unredressed.

---

[1] In *Bivens v. Six Unkown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court held that the victim of a Fourth Amendment violation by federal officers acting under color of their authority may bring suit for money damages against the officers in federal court.

> It is whether an elaborate remedial system that has been constructed step-by-step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.

Bush, Id. at 388, 103 S.Ct. at 2416-17. The Supreme Court answered this question in the negative. The Court found that the judiciary should not create such new remedies when Congress has constructed a remedial system for redress.

Plaintiff contends that the remedy provided in this case is so limited that it results in the absence of meaningful remedies being provided under CSRA, thereby precluding application of *Bush*. Although plaintiff believes his remedy is inadequate under the system, the Court expressly recognized that "civil service remedies were not as effective as n individual damages remedy and did not fully compensate [a plaintiff] for the harm suffered." *Id.* at 372, 103 S.Ct. at 2408.

The Court stated in *Chilicky* that "we refused — again unanimously — to create a *Bivens* remedy for a . . . violation 'aris[ing] out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States.' " *Chilicky*, 56 U.S.L.W. at 4770, quoting *Bush*, 462 U.S. at 389-90. The court discussed at length the remedy sought by respondents and found it to be virtually identical to the one sought in *Bush*. Upon review of the statutory scheme created by Congress, the Court found that the relief sought by respondents was unavailable as a matter of law.

The Court's decision was premised upon the conclusion that Congress was in a better position than the courts to decide whether particular remedies should be available to federal employees with respect to wrongs allegedly suffered in connection with personnel actions. *Bush*, 462 U.S. at 389, 103 S.Ct. at 2417. In essence, the Supreme Court deferred to Congress, pointing out that the policy judgment involved should be an informed one and that Congress was much better equipped than the courts to inform itself about the

respective costs and benefits affecting the public interest in an efficient civil service. *Id.* at 388-89, 103 S.Ct. at 2417. *See also McCollum v. Bolger*, 794 F.2d 602, 607 (11th Cir. 1986), *cert. denied sub nom. McCollum v. Tisch*, ____ U.S. ____, 107 S.Ct. 883 (1987); *Hallock v. Moses*, 731 F.2d 754, 757 (11th Cir. 1984). In this case, Congress has provided the remedy to which it determined an individual would be entitled when there is a prohibited personnel practice.

Plaintiff states, in reliance on *McIntosh v. Weinberger*, 810 F.2d 1411, 1435-36 (8th Cir. 1987), that *Bush* implies that there should be no additional *Bivens* type remedy under the Constitution only where there is no meaningful and adequate statutory remedy for constitutional violations. The court notes that the *McIntosh* court found that the defendant did not identify any other remedy for his action that the plaintiff could have invoked. In such a case, Congress apparently has not provided a remedy. In the instant case, however, Congress has provided for review by the OSC when a prohibited personnel practice is alleged. Therefore, plaintiff has not demonstrated that his case would fall within a possible exception created for situations without a remedy. The court further notes that *McIntosh* has been vacated and remanded. *See Turner v. McIntosh*, 56 U.S.L.W. 3879 (U.S. June 27, 1988). Therefore, that case fails to provide adequate support for plaintiff's position.

Plaintiff contends that the remedy provided for prohibited personnel actions under the CSRA is inadequate. Specifically, he argues that since such remedy provided is not as adequate as that available to the plaintiff in *Bush*, that the doctrine of *Bush v. Lucas* does not bar a *Bivens* type remedy. Plaintiff's argument was also made by respondents in *Chilicky* and specifically rejected by the Supreme Court. *Chilicky*, 56 U.S.L.W. at 4771. Additionally, this argument has been consistently rejected by the Eleventh Circuit Court of Appeals. *See Wells v. F.A.A.*, 755 F.2d 804, 810 (11th Cir. 1985). *See also McCollum v. Bolger*, 794 F.2d at 607; *Hallock v. Moses*, 731 F.2d at 757.

The Eleventh Circuit has refused to find that a disparity in remedies should result in one federal employee having a civil damages remedy, where another with a more serious claim is barred from such a remedy. "We should never suppose that in providing more effective remedies for some grievances than for others, the Congress intended that those grievants who were left in the second group were really meant to be better off than those in the first." *Wells v. F.A.A.*, 755 F.2d at 810.

Hence, the law in this circuit is clear that plaintiff's *Bivens* type remedy is barred in cases such as this which allege prohibited personnel practices under the CSRA. The court notes that plaintiff has failed to adequately distinguish these cases or present any plausible argument as to why this court should not follow the strong precedent that has been established in this circuit.

The fact that plaintiff has alleged constitutional violations does not take his claims outside the remedial provisions of the CSRA. The Supreme Court recognized that "[c]onstitutional challenges to agency action . . . are fully cognizable within [the CSRA]." *Bush v. Lucas*, 462 U.S. at 386, 103 S.Ct. at 2415. Moreover, the analysis in *Bush* applies regardless of the constitutional right alleged to have been violated. *Wells v. F.A.A.*, 755 F.2d at 809; *Dynes v. Army Air Force Exchange Service*, 720 F.2d 1495, 1498 (11th Cir. 1983).

Furthermore, the Supreme Court has held that when an individual is employed within the framework of the CSRA, even where Congress has failed to provide any right of judicial review under the CSRA, such individual is not free to pursue "whatever judicial remedies he would have had before enactment of the CSRA." *United States v. Fausto*, ____ U.S. at ____, 108 S.Ct. at 673. Based on *Fausto*, even if plaintiff, employed as a CSRA employee, was provided no remedy under CSRA, he would not be entitled to judicial review for the type of personnel related issues set forth herein.

"When the design of a government program suggests that Congress has provided what it considers adequate remedial mech-

anisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Schweiker v. Chilicky*, 56 U.S.L.W. at 4770. The CSRA clearly sets forth the remedy to which Congress considered adequate for prohibited personnel practices in the CSRA. This design leaves no doubt that Congress believed it was providing an adequate remedy for prohibited personnel practices. Moreover, *Fausto* and *Schweiker*, in addition to the strong precedent in this Circuit, leave little doubt that courts are precluded from fashioning a judicial remedy based upon a perception that the remedy provided by Congress is inadequate.

In the instant case, plaintiff's claims arise "out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States," therefore, this court should not supplement that "regulatory scheme" with a further, judicially-created damages remedy. *See Bush v. Lucas*, 462 U.S. at 368, 103 S.Ct. at 2306; *McCollum v. Bolger*, 794 F.2d at 607, *Wells v. F.A.A.*, 755 F.2d at 809-10; *Hallock v. Moses*, 731 F.2d at 757. The recent Supreme Court cases of *Fausto* and *Chilicky* clearly demonstrate that Congress' decision not to provide a mechanism by which employees such as plaintiff may obtain judicial review of agency employment decisions is not an uninformative consequence of the limited scope of the statute, but rather a manifestation of a considered congressional judgment that they should not be subject tc such review. *United States v. Fausto*, ____ U.S. at ____, 108 S.Ct. at 673-74.

In view of the foregoing, the court concludes that plaintiff may not obtain *Bivens* relief against federal officials in their individual capacities in this case as Congress has provided comprehensive procedural and substantive provisions which give meaningful remedies against the United States by way of the CSRA. Such relief is unavailable as a matter of law.[2] Therefore, plaintiff

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[2] The conclusion reached by this court is further supported by the Supreme Court's decision to vacate and remand for further consideration in light of *Schweiker* another case heavily relied upon by plaintiff in his response to the

can prove no set of facts that would entitle him to relief. Accordingly, the court should grant defendants' motion to dismiss. *Madison*, 752 F.2d at 607.

For the reasons set forth above, the court concludes that this action should be DISMISSED [for] failure state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P.12 (b) (6).

B. VETERAN'S PREFERENCE

Plaintiff argues that he has the "right to vindicate the statutory violation of being deprived a veterans preference to the appointment." However, as defendants correctly state, employees seeking a different position within the agency are not entitled to a veterans' preference when the position sought would constitute an internal agency promotion.

> When the Veterans' Preference Act was passed, it was explained to Congress that it provided a preference both in *appointment* to and *retention* in Federal positions. *See Hilton v. Sullivan*, 334 U.S. 323, 338 n.14, 68 S.Ct. 1020, 92 L.Ed. 1416 (1948). With the sole exceptions of additional credits for military service provided examinees by Section 4 of the Act, 5 U.S.C. § 3363, neither the Act nor the CSC regulations promulgated thereunder accord veterans preferential treatment in promotions.

Crowley v. United States, 327 F.2d 1176, 1183 (Ct.Cl. 1975). A veteran is entitled to preference over non-veterans only in connection with an initial appointment to the federal service or in connection with a reduction-in-force among personnel in the same competitive level. *Qualls v. United States*, 678 F.2d 190, 196-97

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defendants' motion to dismiss, *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir. 1986), *vacated and remanded sub nom. Cooper v. Kotarksi*, 56 U.S.L.W. 3879 (U.S. June 17, 1988).

(Ct.Cl. 1982). As neither situation existed in this case, plaintiff was not entitled to a veterans' preference.

The court is aware that various agencies have designed employment plans that consider a veterans' preference in promotions. *See e.g., Rios v. Dillman*, 499 F.2d 329 (5th Cir. 1974). Although such plans have been found to be constitutional as applied to non-veterans, the cases do not support plaintiff's position that he is entitled to such a preference, absent a personnel plan which provides for such a preference in promotions. Therefore, such cases are not applicable to the instant case, and the Veterans' Preference Act, in and of itself, does not apply to promotions.

III. PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiff moves to amend the complaint to seek mandamus relief against the individual defendants under 28 U.S.C. § 1361 and to seek injunctive relief under the court's common law equitable jurisdiction. Plaintiff states that this relief is requested in the event this court accepts the position urged by defendants as set forth in *United States v. Fausto* and *Schweiker v. Chilicky* and denies similar monetary and equitable relief in Civil Action 1:86-CV-1875-HTW. Plaintiff argues that this amendment would not prejudice the defendants, would not delay the case and should be granted under the liberal requirements of Fed.R.Civ.P. 15.

This action has been pending before this court since August 10, 1987. On October 10, 1987, defendants filed a motion to dismiss and filed a supplemental memorandum to that motion on August 25, 1988. The court determines that an amendment to the complaint at this time would effect an undue delay in this case. The court further determines that for the reasons set forth above under "Application of *Bush v. Lucas*" plaintiff is not entitled to judicial relief for the claims set forth herein, whether such relief be monetary or injunctive. Hence, amendment to the complaint would be futile. Justice does not so require that a complaint be amended under these circumstances. Therefore, plaintiff's motion for leave to amend the complaint is DENIED.

In summary, plaintiff's motion for leave to amend the complaint is DENIED, and defendant's motion to dismiss is GRANTED. It is hereby ORDERED that this case is DISMISSED with prejudice.

SO ORDERED, this 4th day of April, 1989.

/s/ Horace T. Ward
HORACE T. WARD
UNITED STATES DISTRICT JUDGE